SUPREME COURT OF THE UNITED STATES.

No. 230.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, APPELLANT,

vs.

JAMES T. SOUTTER, SURVIVOR, &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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1 Continuation of the record in the case of James T. Soutter, survivor, &c., *vs.* The La Crosse and Milwaukee Railroad Company *et al.*, since the appeal of the Milwaukee and Minnesota Railroad Company from the decretal order of sale, made and entered on the 18th day of September, 1866.

JAMES T. SOUTTER, survivor, &c.,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD Company *et al.* } In equity.

MARCH 5TH, 1867.

This day came the complainant, by his solicitor, Mr. Ogden, and filed his petition for an order of sale in the words and figures following, to wit:

Circuit Court of the United States, district of Wisconsin.

JAMES T. SOUTTER, survivor, &c.,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD Company *et al.*

The petition of the complainant by Thomas L. Ogden, his solicitor, shows to this court that the coupons for the interest maturing on the bonds and mortgage set forth in the pleadings, and which became due and payable on the first day of March, A. D. 1867, have not been paid, and that the same amounts to the sum of forty thousand dollars; wherefore your petitioner prays that an order of sale of the mortgaged premises may be made by this honorable court in accordance with the decree in this action.

JAMES T. SOUTTER,
By ALEX. MITCHELL
THOMAS L. OGDEN,
Sol. for Comp't.

2 DISTRICT OF WISCONSIN, *ss:*

On this fourth day of March, A. D. 1867, before me, personally appeared the above-mentioned Alexander Mitchell, and made oath that the complainant in this suit is not within this district, and that he was authorized to represent him in this action, and that he has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true.

J M. MILLER,
U. S. Commissioner, Wisconsin.

Take notice that a petition, a copy of which is herewith served on you, will be presented to the Circuit Court on Tuesday, the 5th day of March, at the opening of the court on that day.

Dated March 4th, 1867.

THOMAS L. OGDEN,
Sol. for Comp't.

Indorsed: "Copy served on me this 4th day of March, 1867. I have resigned as att'y of the co.

"MATT. H. CARPENTER.

"We admit service of copy of the within petition and notice.

"FINCHES, LYNDE & MILLER,

"*Attorneys of Milwaukee and Minnesota R. R. Co.*

"March 4, 1867."

3 THE UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the Circuit Court of the United States of America for the ninth circuit and district of Wisconsin, began and held according to law, on the first Monday in January, A. D. 1867, at the city of Madison, in said district of Wisconsin, present and presiding the Hon, Andrew G. Miller, district judge.

On the sixth day of the term, to wit, on the fifth day of March, A. D. 1867, the following proceedings were had, to wit:

JAMES T. SOUTTER, survivor, &c.,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD Company, The Milwaukee and Minnesota Railroad Company, Selah Chamberlain, Sebre Howard, Conrad Willaner, Edward H. Broadhead, Newcomb Cleveland, William Gemmel, Joshua Hathaway, James Wolstenholme, Edwin H. Litchfield, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simonds, De Witt C. Freeman, E. Bradford Greenleaf, Frederick Lynd, Sebastian Knetzger, Lawrence G. Graham, Donald D. Scott, Thomas Turton, John Sercomb, Ephraim Mariner, Avery Hill, A. V. Rudd, Franklin J. Blair, Edmund R. Persons, Philip S. Justice, Elkana Cobb, John V. Bean, Philip Wilson, J. Howard Mitchell, Edwin Townsend, The Mercantile Bank of Hartford, Conn., August Lauthof, Charles Quentin, John H. Tesch, Byron Kilbourn, Nathaniel S. Bouton, The Juneau Bank, The Milwaukee, Watertown, and Baraboo Valley Railroad Company, Cicero Comstock, George W. Chapman, Moses M. Davis, Charles Howard, and Henry Vallette. } In equity.

4 This day, on reading and filing the petition of the complainant in this cause, and on reading the decree made by this court on the 27th day of September, A. D. 1864, and it appear-

ing to the court that the principal sum secured by the bonds and mortgage set forth in the bill of complaint is one million of dollars; that the amount of interest now due, and which became due on the first day of March, 1867, is the sum of forty thousand dollars. And on motion of Thomas L. Ogden, solicitor for the complainant, it is ordered, adjudged, and decreed, and this court doth hereby order and decree, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount owing to the complainant for the several bondholders, for principal, interest, and costs in this cause, be sold at public auction, under the direction of the marshal of this district; and it is further ordered that the said sale be made at the post-office, in the city of Milwaukee, within this district, where the said premises are situate, and that the said marshal give public notice of the time and place of such sale by advertisement, published in some newspaper printed in said city, and in two newspapers printed in the city of New York, at least once in each week for twelve successive weeks previous to the day of sale; and that said complainants, or any of the parties to this cause, may become the purchaser thereof, and that said marshal execute a deed or deeds to the said purchaser or purchasers of the mortgaged premises, and that the said marshal pay to the complainant or his solicitor of the proceeds of such sale his costs in this cause to be taxed, and which have not already been paid, and that he pay into court in the coupons on the bonds set forth in the pleadings, which matured on the first day of September, A. D. 1866, or in cash or in both, the amount found due to the bondholders, and adjuged to the complainant by the decretal order of sale of this court, made on the eighteenth day of September, A. D. 1866, and the amount so paid into court by the said marshal shall remain subject to the further order of this court. And it is further ordered, adjudged, and decreed that the defendant, and all persons claiming or to claim from or under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged premises, and every part and parcel thereof, when said sale shall be confirmed.

And it is further ordered, adjudged, and decreed that the
5 purchaser or purchasers of said mortgaged premises at such sale be let into the possession thereof, and that any of the parties to this cause, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on presentation of the deed of said premises, and a certified copy of the order confirming the report of sale.

And it is further ordered and decreed that the purchaser or purchasers at such sale may pay therefor in the bonds and coupons of the La Crosse and Milwaukee Railroad Company, included in this decree in proportion to the amount bid bears to the whole sum secured by the mortgage, after payment of costs and expenses of sale, and that the marshal report to the court the bonds secured by the said

mortgage, and the coupons of such bonds respectively by their amounts and numbers respectively not presented or paid to him on or towards the purchase of the said mortgaged premises, and also the share and amount of the purchase money of the mortgaged premises, applicable to the payment of the bonds and coupons last mentioned.

And it is further ordered and decreed, that in case of a sale of the mortgaged premises under this decree, the proceeds shall be applied to the balance of the interest due, and if such proceeds exceed such balance, the same shall be applied to the further accruing interest, down to the date of such sale; and if [if] the proceeds exceed such balance, the same shall be applied to the principal of the bonds, in case the bondholders assent, or pro rata to those who may assent, and any remaining balance of the said proceeds be invested, under the direction of the court, for the payment of the future accruing interest, and ultimately for the principal.

The description of the property authorized to be sold, under and by virtue of this order, is as follows, viz:

All and singular the railroad of said company, commencing in the city of Milwaukee, and running thence to Portage City, a distance of ninety-five miles, which road has been constructed and is now in full operation; and also the railroad of said company (as well that part which has been constructed as that part which remains to be constructed) from Watertown, by way of Columbus, to Midland, (where it connects with the main line of the railroad of said company,) a distance of forty miles; one-half of which last-mentioned road being the part between Watertown and Columbus, was constructed at the time of the execution of the said mortgage, and was then in full
6 operation, including all and singular the several tracts, pieces, or parcels of land which then did, or might thereafter constitute, the site of the roadways, turnouts, engine-houses, workships, depots, and other buildings, and all the other land and real estate which then constituted, or might thereafter constitute, or be a part of or appertain to said railroads, or either of them; and also all and singular the superstructure of said railroads, whether then made, or made thereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, or either of them, whether then built or made, or thereafter built or made; and also all and singular the locomotive engines, cars, and rolling stock, and all the materials, tools, implements, and utensils and other personal property which had been procured for or used in connection with the said roads, or either of them, prior to the appointment of Hans Crocker as receiver of said road, except forty box cars, numbered respectively, 330. 332, 334, 336, 338, 340, 342, 444, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390, 392, 394, 396, 398, 400, 402, 404, 406, and 408, and including as part of said mortgaged premises such proportion of the rolling stock bought by the receiver since his appointment as the net earnings of the eastern division of said railroad bears to the earnings of the western division, as ascertained by the report of H. L. Palmer, and as confirmed by the court; and also all

and singular, the rights, liberties, and franchises of said railroad company, so far as they relate to said railroads from Milwaukee to Portage City, and from Watertown, by way of Columbus, to Midland aforesaid; and all the property, real and personal, and all the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads from Milwaukee to Portage City, and from Watertown, by the way of Columbus, to Midland. It is further ordered that the marshal sell all the other property mentioned in this decree first, and before he sells the railroad from Watertown by way of Columbus and Midland, and that this shall not be sold if that which is first sold shall bring a sufficient sum to satisfy the debt, interest, and costs mentioned in this decree.

And it is further ordered that this decree, and any sale made thereunder, shall be without prejudice to any claim, right, or
7 interest of the defendant, Ephraim Mariner, to a part of the premises covered by the mortgage described in the bill in this cause, as purchaser under a judgment of the circuit of Milwaukee County in the case of Avery Hill and A. V. Rudd *vs.* The La Crosse and Milwaukee Railroad Company, recovered September 27th, 1858, and under a judgment of the County Court of Milwaukee County, in the case of Joseph Carney *vs.* The La Crosse and Milwaukee Railroad Company, rendered September 29th, 1858, which premises are known and described as the west sixty feet of lots five, six, and seven, and of the alley between lots five and six, in block forty-one, in the second ward of the city of Milwaukee. And it is further ordered, adjudged, and decreed, that any party or person interested may, at any time before a sale of the mortgaged premises under this decretal order, pay to the marshal of this district the amount of the said coupons or interest warrants which fell due on the first day of March, 1867, together with interest thereon from that day to the day of such payment, and the costs of executing this order, and that in that case no sale of the mortgaged premises shall be made under this order, and that such payment may be made in the said coupons, or in money, or in both.

A. G. MILLER.

MARCH 6TH, 1867.

This day came the defendant, by J. Stark and E. Mariner, and filed affidavit of Aaron S. Bright, and copy of resolutions of said defendant, as follows, to wit:

In Circuit Court of the United States for the district of Wisconsin, in equity.

JAMES T. SOUTTER, survivor, &c., complainant,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD Company, the Milwaukee and Minnesota Railroad Company, and others, defendants.

DISTRICT OF WISCONSIN, *ss:*

Aaron S. Bright, being duly sworn, saith:

That he is one of the directors of the Milwaukee and Minnesota Railroad Company, one of the defendants in this cause, and that annexed hereto is a true copy of the original statement of the
8 resignation of Matt. H. Carpenter, esq., as attorney and solicitor for said defendant, this day handed by said Carpenter to this deponent, and by the vice president laid before the board of directors of said company, and of the action of said board thereon, accepting the resignation of said Carpenter, and appointing Joshua Stark and E. Mariner the attorneys of said company in his stead.

AARON S. BRIGHT.

Subscribed and sworn to before me, this 6th day of March, A. D. 1867.

JAMES McFARLIN,
U. S. Commissioner, Dist. of Wis.

Extract from the proceedings of the board of directors of the Milwaukee and Minnesota Railroad Company, held at the Newhall House, in Milwaukee, on the 6th day of March, 1867.

The vice president, A. C. Gunnison, laid before the board the following written statement of M. H. Carpenter, esq., the late attorney of this company:

I hereby certify, that on the 24th day of January, A. D. 1867, I resigned as attorney of the Milwaukee & Minnesota Railroad Company, and tendered such resignation to Alex. Fleming, president of said company, which was accepted by him. I also, same day, filed formal written resignation with John P. Green, esq., treasurer of said company, and directed him to notify all persons interested.

Milwaukee, March 6th, 1867.

MATT. H. CARPENTER.

Thereupon, on motion, it was resolved that the resignation of Mat. H. Carpenter, esq., as attorney of this company, tendered to and accepted by the late president of this company, be, and the same is hereby accepted by this board.

Resolved, That Joshua Stark and E. Mariner be, and they are hereby appointed the attorneys of this company under the by-laws thereof, and that they be, and are, authorized and directed to appear

for this company as its attorneys, in all actions and legal proceedings in which said company is a party or interested, and to commence, prosecute, or defend any and all suits or proceedings in any court, State or federal, in which this company is a party, or interested, in such manner as they may deem for the best interests of this company, and that the secretary or any director of this company be, and hereby is, directed to affix the seal of this company to any bill, answer, bond, or other paper except a release or discharge, which the said Stark and Mariner may in writing or verbally request such secretary or director to affix the same to, to be used in any judicial proceeding, cause, or action in which this company is a party or interested.

Resolved further, that said Stark and Mariner, as attorneys of this company be, and are hereby directed to take an immediate appeal to the Supreme Court of the United States from the decretal order of sale of the road, appurtenances, and franchises of the company, made in the foreclosure suit of Soutter, survivor, &c., *vs.* this company and others, March 5th, 1867, at Madison, by the Circuit Court of the United States for the district of Wisconsin.

A true copy from records.

AARON S. BRIGHT.

It appearing by the within affidavit, and the papers annexed thereto, that Mat. H. Carpenter has resigned as attorney of the defendant, the Milwaukee and Minnesota Railroad Company, and that his resignation has been accepted by the board of directors, and that Joshua Stark and E. Mariner have been appointed by said board attorneys of said company in his stead, ordered, that said Stark and Mariner be, and they are hereby substituted upon the record as the solicitors for said defendant, the Milwaukee & Minnesota Railroad Company, in this cause.

Milwaukee, March 6, 1867.

A. G. MILLER, *Dist. Judge.*

And on the same day came the said Milwaukee & Minnesota Railroad Company by its said solicitors, Stark and Mariner, and filed its petition for an appeal with the allowance thereof thereon, endorsed by the district judge, in the words and figures following, to wit:

In the Circuit Court of the United States for the district of Wisconsin.

JAMES T. SOUTTER, survivor, &c., complainant,
vs.
THE LA CROSSE & MILWAUKEE RAILROAD COMPANY, the Milwaukee & Minnesota Railroad Company, and others, defendants.

To the judges of said the circuit, and to Hon. A. G. Miller, judge of the District Court of the United States for the district of Wisconsin, and one of the judges of said Circuit Court.

Your petitioner, the Milwaukee & Minnesota Railroad Company,

by J. Stark and E. Mariner, its solicitors, humbly complaining, respectfully represents, that it, said company, is a party defendant in the above-entitled cause, and the owner of the equity of redemption of the mortgaged premises described in the mortgage, to foreclose which this suit was commenced, as appears by the records and proceedings in this cause; and that it is aggrieved and injured by a certain decretal order of sale made by said Circuit Court in equity in this cause on the 5th day of March, A. D. 1867, by which order, among other things, the said mortgaged premises were ordered to be sold, as appears by the said order now of record in this cause; and your petitioner respectfully prays for, and demands an appeal to the Supreme Court of the United States from said decretal order, made as aforesaid, and for a citation according to law, and for supersedeas of said order pending said appeal; and your petitioner herewith offers its bond, with sureties, to be approved for such supersedeas in the penal sum of fifty thousand dollars, with sureties, who justify according to law, and your petitioner will ever pray, &c.

MILWAUKIE & MINNESOTA RAILROAD COMPANY,
By J. STARK & E. MARINER,
Its Solicitors.

11 Which petition had upon it the following indorsement, to wit:

"March 6, 1867. Appeal allowed; appellant to give bond with sureties to be approved by a judge of this court for a supersedeas in the penalty of fifty thousand dollars.

"A. G. MILLER, *Judge.*"

MARCH 16, 1867.

This day came the defendant, the Milwaukee and Minnesota Railroad Company, by Stark & Mariner, its solicitors, and presented to the district judge a bond for appeal, and as a supersedeas, in the words and figures following, to wit:

Circuit Court of the United States for the district of Wisconsin, in equity.

JAMES T. SOUTTER, survivor, &c.,
agst
THE LA CROSSE & MILWAUKEE RAILroad Company and others.

Know all men by these presents, that we, the Milwaukee and Minnesota Railroad Company, as principal, and William R. Griffith, of No. 47 West 31st street, in the city of New York, gentleman; William A. Guest, of No. 86 Ninth street, in said city, banker; James A. Crosby, of No. 20 Broad street in said city, gentleman; William S. Carman, of No. 34 East 129th street in said city, bank president; Lyman Bennett, of Troy, N. Y., manufacturer; William L. Van Alstyne, of Troy, N. Y., merchant; Oliver Boutwell, of Troy, N. Y., miller; William Gunnison, of Troy, N. Y., manufacturer, as sureties, acknowledge ourselves to be held and firmly bound, and are so held

and bound unto James T. Soutter, complainant in this cause, in the sum of fifty thousand dollars, to be paid to the said John T. Soutter, complainant, his executors, administrators, or successors, in lawful money of the United States, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by
12 these presents. Sealed with our seals, dated this eleventh day of March, A. D. 1867.

The condition of this obligation is this: that whereas the above-named the Milwaukee and Minnesota Railway Company is about to apply to the said Circuit Court of the United States for the district of Wisconsin for an appeal to the Supreme Court of the United States from a certain decretal order of sale, made by said Circuit Court in this cause on the fifth day of March, A. D. 1867: Now, therefore, the condition of this obligation is such that if the said Milwaukee & Minnesota Railroad Company shall prosecute said appeal to effect, and answer all costs and damages, and any order or decree the said Supreme Court may make and render if the said Milwaukee & Minnesota Railroad Company shall fail to make good their said appeal, then this obligation shall be void, otherwise the same shall remain in full force and effect.

[SEAL] AARON S. BRIGHT,
President Milwaukee & Minnesota Railroad Co.
[SEAL.] WM. R. GRIFFITH.
[SEAL.] WM. A. GUEST.
[SEAL.] JAMES A. CROSBY.
[SEAL.] W. S. CARMAN.
[SEAL.] LYMAN BENNETT.
[SEAL.] W. L. VAN ALSTYNE.
[SEAL.] O. BOUTWELL.
[SEAL.] WM. GUNNISON.

Signed, sealed, and delivered in presence of—
A. C. GUNNISON.
AARON S. BRIGHT.

UNITED STATES OF AMERICA, *Southern District of New York, State, City, and County of New York, ss:*

William R. Griffith, being duly sworn, says: I reside at No. 47 West Thirty-first street, in the city of New York; I am not now engaged in business. I am a resident and householder within said city and State of New York, and am worth the sum of fifty thousand dollars over and above all my debts and liabilities, and all exemptions of property from forced sale on execution.

WM. R. GRIFFITH.

Subscribed and sworn to before me, this eleventh day of March, 1867.

R. E. STILWELL, *U. S. Com.*

[5-cent revenue stamp.]

13 UNITED STATES OF AMERICA, *Southern District of New York, State, City, and County of New York, ss:*

William A. Guest, being duly sworn, says: I reside at No. 86 Ninth street, in the city of New York; I am engaged in business as banker at 31 Wall street, New York City. I am a resident and householder within said city and State of New York, and am worth the sum of fifty thousand dollars over and above all of my debts and liabilities, and all exemptions of property from forced sale on execution.

WM. A. GUEST.

Subscribed and sworn to before me, this eleventh day of March, 1867.

R. E. STILWELL, *U. S. Com.*

[5-cent rev. stamp.]

UNITED STATES OF AMERICA, *Southern District of New York, State, City, and County of New York, ss:*

James A. Crosby, being duly sworn, says: I reside at No. — Exchange Place, Jersey City. I am not engaged in business, but have an office at 20 Broad street, New York City. I am a resident and freeholder within said Jersey City and State of New Jersey, and am worth the sum of twenty thousand dollars over and above all my debts and liabilities, and all exemptions of property from forced sale on execution.

JAMES A. CROSBY.

Subscribed and sworn to before me, this eleventh day of March, 1867.

R. E. STILWELL, *U. S. Com.*

[5-cent revenue stamp]

UNITED STATES OF AMERICA, *Southern District of New York, State, City, and County of New York, ss:*

William S. Carman, being duly sworn, says: I reside at No. 34 East 129th street, in the city of New York. I am engaged in business as a banker—president of the Bank. I am a resi-
14 dent and householder within said city and State of New York, and am worth the sum of ten thousand dollars over and above all my debts and liabilities, and all exemptions of property from forced sale on execution.

WM. S. CARMAN.

Subscribed and sworn to before me, this eleventh day of March, 1867.

R. E. STILWELL, *U. S. Com.*

[5-cent revenue stamp.]

UNITED STATES OF AMERICA,
Northern District of New York,
State of New York, and City of Troy, ss:

Lyman Bennett, being duly sworn, says: I reside at No. 74 Fifth street, in the city of Troy. I am engaged in business as a manufacturer. I am a resident and householder within the said city and State of New York, and am worth the sum of five thousand dollars over and above all my debts and liabilities, and all exemptions of property from forced sale on execution.

LYMAN BENNETT.

Subscribed and sworn to before me, this 12th day of March, 1867.
[SEAL.] JOS. HILLMAN,
Com'r for Wisconsin.

[5-ct. r. s., canc'd.]

UNITED STATES OF AMERICA,
Northern District of New York,
State of New York and City of Troy, ss:

Wm. L. Van Alstyne, being duly sworn, says: I reside at No. 28 Fourth street, in the city of Troy. I am engaged in business as a merchant. I am a resident and householder within said city and State of New York, and am worth the sum of five thousand dollars over and above all my debts and liabilities, and all exemptions of property from forced sale on execution.

W. L. VAN ALSTYNE.

Subscribed and sworn to before me, this 12th day of March, 1867.
[SEAL..] JOS. HILLMAN,
Com'r for Wisconsin.

[5-ct. r. s., canc'd.]

15 UNITED STATES OF AMERICA,
Southern District of New York,
State, City, and County of New York, ss:

Be it remembered, that on this eleventh day of March, A. D. 1867, before me, Richard E. Stilwell, a commissioner of the United States, residing in the city, district, and State above mentioned, personally came and appeared Aaron S. Bright, to me known, who being by me duly sworn, did depose and say that he was the president of the Milwaukee and Minnesota Railroad Company; that he resided at Long Branch, in the State of New Jersey; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed by order of the board of directors of said company, and that he signed his name hereto by the like order as president of said company; and at the same time before me also personally came and appeared William R. Griffith, William A. Guest, James A. Crosby, and William S. Carman, to me known to be four of the persons described in and who executed the foregoing bond, and thereupon the said William R. Griffith, William

A. Guest, James A. Crosby, and William S. Carman, did severally, each for himself, acknowledge that he executed the said bond, and declared the same to be his free act and deed for the uses and purposes therein mentioned.

R. E. STILWELL,
U. S. Com'r.

[5-ct. r. s., cancl'd.]

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, Kenneth G. White, clerk of the Circuit Court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of R. E. Stilwell, whose name is subscribed to the annexed certificate and jurats, and that the signature to the same is in his proper handwriting. And I do further certify that he was, at the time of signing the same, a United States commissioner, duly appointed by the Circuit Court of the United States of America for the
16 southern district of New York, second circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Circuit Court, this twelfth day of March, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

[L. S.] KENNETH G. WHITE, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of New York, City of Troy,
Rensselaer Co., and State of New York, ss:

Oliver Boutwell, being duly sworn, says: I reside at 625 street, in the city of Troy. I am engaged in business as a miller. I am a resident and householder within the said city and State of New York, and am worth the sum of five thousand dollars over and above all my debts and liabilities, and all exemptions of property from forced sale on execution.

O. BOUTWELL.

Subscribed and sworn before me, this 12th day of March, 1867.

[SEAL.] JOS. HILLMAN,
Com'r for Wisconsin.

[5-ct. r. s., canc'd.]

UNITED STATES OF AMERICA,
Northern District of New York, City of Troy,
Rensselaer County, and State of New York, ss:

William Gunnison, being duly sworn, says: I reside at No. 11 Seventh street, in the city of Troy. I am engaged in business as a manufacturer; and am a resident and householder within the said city and State of New York, and am worth the sum of five thousand dollars over and above all my debts and liabilities, and all exemptions of property from forced sale on execution.

WM. GUNNISON.

Subscribed and sworn to before me, this 12th day of March, 1867.
[SEAL.] JOS. HILLMAN,
Com'r for Wisconsin.

[5-ct. r. s., canc'd.]

17 And came the complainant, by his solicitor, Mr. Ogden, and presented to the district judge and filed his objections to the approval of said bond as follows, to wit:

Circuit Court of the United States, district of Wisconsin.

JAMES T. SOUTTER, survivor, &c.,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD Company and others.

And now comes the complainant, by Thomas L. Ogden, his solicitor, and objects to the approval of the bond for a supersedeas given on appeal from the decretal order of March, 5th, 1867, for the reason that none of the sureties on said bond are residents of this State.

THOMAS L. OGDEN,
Sol. for Compl't.

Whereupon the district judge disallowed said bond as a supersedeas by an indorsement on said bond as follows, to wit:

Bond disallowed.

"MARCH 16, 1867.

"The counsel of complainant having objected to the allowance of this bond for supersedeas on the ground that all the sureties are non-residents of the district, for this reason this bond is not approved for a supersedeas.

"A. G. MILLER,
"*District Judge.*

"March 20, 1867. Citation issued."

18 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the Circuit Court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 20th day of March, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-first.

[SEAL.] A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLAN, *Deputy.*

19 UNITED STATES OF AMERICA, *ss:*

To James T. Soutter, survivor, &c.:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to an appeal allowed and filed in the clerk's office of the Circuit Court of the United States for the seventh circuit and district of Wisconsin, wherein the Milwaukee and Minnesota Railroad Company (impleaded with the La Crosse and Milwaukee Railroad Company and others) is appellant, and you are respondents, to show cause, if any there be, why the decretal order of sale, dated March 5th, 1867, and in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twentieth day of March, A. D. 1867.

A. G. MILLER,
District Judge.

Indorsed: Circuit Court of the United States for the district of Wisconsin. James T. Soutter, survivor, &c., compl't respondent, *vs.* Milwaukee and Minnesota Railroad Company, impleaded, &c., appellant. Citation. J. Stark and E. Mariner, sols. for appellant. Service admitted March 20, 1867. Thomas L. Ogden, sol. for comp't.

Supreme Court of the United States.

DECEMBER TERM, 1867.

THE MILWAUKEE AND MINNESOTA R. R. Co., *Appellant*, vs. JAMES T. SOUTTER, *Survivor, &c.* — No. 172.

ALEXANDER FLEMING, *Appellant*, vs. JAMES T. SOUTTER, *Survivor, &c.* — No. 173.

THE MILWAUKEE AND MINNESOTA R. R. Co., *Appellant*, vs. JAMES T. SOUTTER, *Survivor, &c.* — No. 230.

Brief for the Milwaukee and Minnesota Railroad Company and Alexander Fleming.

The above causes, involving the same questions, are discussed as one case in the present brief.

I. The appeals in the two first cases, Nos. 172 and 173, are from the decretal order in the cause of Soutter vs. The LaCrosse Railroad, of September 15, 1866, which directed the sale of the road and its appurtenances, claimed by and in possession of the Milwaukee and Minnesota Railroad Company, the appellants in two of these cases. (Tr. Nos. 172 and 173, pp. 193, 189.)

On the 10th of September, 1866, James T. Soutter, survivor of Greene C. Bronson and James T. Soutter, filed his petition in this cause, setting forth that $40,000 of interest was due September 1, 1866, on the bonds and mortgage described in the bill filed in the cause, being the bonds secured by the mortgage in which Bronson and Soutter were trustees, the mortgage covering so much of the former LaCrosse and Milwaukee Railroad, now owned by the Milwaukee and Minnesota Railroad Company, as is located between Milwaukee and Portage City, known as the Eastern Division.

Petitioner further states that the mortgaged premises are subject to two mortgages prior to his mortgage; that on the first of these mortgages there is now due $38,000 for interest, and $72,000 on the sinking fund; and that there was also due on the second mortgage, known as the city mortgage, the sum of $10,000 for interest.

That there is also due from the said railroad, the Milwaukee and Minnesota Company, to the State of Wisconsin, for a license for the year 1866, the sum of $10,000, for the non-payment of which the charter of the road is liable to forfeiture.

That the Milwaukee and Minnesota Railroad Company have been in possession of said road since January, 1866, and have received the income of the road since that time, and that no part of said income has been applied to the interest, or sinking fund of the first mortgage, or interest on the city mortgage, or to pay the license due the State of Wisconsin, or the interest due on petitioner's mortgage.

That proceedings have been instituted to foreclose the first mortgage, for the non-payment of interest and sinking fund, and petitioner is informed the Attorney General of Wisconsin is about to institute proceedings to forfeit the charter of the road for non-payment of the license fee, so that the security for the bondholders represented by the petitioner becomes greatly impaired, and may be lost.

Petitioner prays for an order of sale as provided in the decree of foreclosure rendered in this cause, and that in the mean time a receiver be appointed.—(Transcript, Nos. 172 and 173, p. 184.)

The petition is sworn to by Thomas S. Ogden, petitioner's solicitor, who affirms that the petitioner is a non-resident, that the affiant is petitioner's solicitor, that he knows the contents of the petition, that he has information as to the matters therein stated, and from such information he believes such matters to be truly stated, and the petition to be true.—(Transcript, Nos. 171 and 172, p. 185.)

No order of reference was made of the petition, or evidence taken as to the truth of the facts set forth in the petition.—(Transcript, Nos. 172 and 173, p. 186.)

After argument by counsel, the court, September 18, 1866, decreed in substance as follows:

On reading the petition filed September 10, 1866, and the decree made September 27, 1864, it is ordered that the mortgaged premises be sold to pay the $40,000 interest due on the bonds payable to petitioner.

That the defendants be foreclosed, and the purchaser let into possession.

That the purchaser may make payment in the bonds and coupons of the LaCrosse and Milwaukee Railroad Company, included in this decree, in proportion as the amount bid bears to the whole sum secured by the mortgage.

That, in case of sale, the proceeds be applied to the interest due, and the excess to the accruing interest down to the time of sale; and if the proceeds exceed such balance, the same shall be applied to the principal of the bonds in case the bondholders assent, or pro rata to those who may assent, and any remaining balance to be invested.

The decree describes the property to be sold, and directs that the marshal shall sell all the property mentioned

in this decree first, before he sells the railroad from Watertown, by way of Columbus, to Midland.

The sale to be without prejudice to the claim of Ephraim Manner to a part of the premises.

That any person interested may, before sale, pay to the marshal the amount of interest due September 1, 1866, and costs, and then no sale to take place.—(Transcript, Nos. 172 and 173, p. 156.)

It is proper to remark that the appellant, A. Fleming, is a party defendant by leave of the court.

The appeals in 172 and 173, bring up for consideration question of the correctness of the decree of September 18, 1866, ordering the sale of the road to pay the interest due September 1, 1866, on petitioner's bonds.

II. The appeal in 230. The Milwaukee and Minnesota Railroad Company, appellant, vs. James T. Soutter, survivor, &c., brings up precisely the same questions involved in the appeals in 172 and 173, except that the appeal in No. 230 is from the decree of the court of March 5, 1867, on another petition filed by the same petitioner, James T. Soutter, ordering the sale of the road to pay the sum of $40,000, the interest on petitioner's bonds due March 1, 1867. As the last named petition and decree are of exactly the same description as the petition of September 10, 1866, and the decree of September 18, 1866, a more particular description of them is deemed unnecessary.—(Transcript, No. 230, p. 1, 2.)

The orders for the sale of the mortgaged premises were made on a mere petition, verified by affidavit.

III. From these orders of sale the appeals in this case were taken, and on the following grounds:

1. Because such orders in the then condition of the cause could not be made without a supplemental bill filed for that purpose.

2. Because the sixty days' grace, secured by the terms of the mortgage, had not passed at the time the order was made.

IV. To comprehend the grounds of appeal above taken, some reference to the prior proceedings in the original suit for the foreclosure of the Eastern Division mortgage is necessary.

The first mandate of the Supreme Court, after ordering the sale of the mortgaged premises on default of payment of the interest then due, added, "that in case the interest on the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal."—(Bronson vs. La Crosse R. R., 2 Wallace R., 312.)

Under this mandate the Circuit Court made an order on the 27th September, 1864, containing, so far as is material to the present question, the following provision: "And it is further ordered and adjudged, that after the expiration of the said year the complainant shall be at liberty, when further instalments of interest shall be due and remain unpaid, * * * to apply for an order for the sale of the said mortgaged premises, as by direction of, and in accordance with, the mandate of the Supreme Court."—(Transcript, No. 218, p. 153.)

V. It will be seen by reference to the mandate of the Supreme Court, and the order above cited, that the original decree is to remain "as security for subsequent accruing interest."

The mandate of the Supreme Court is, of course, the law of the case, and no effort is proposed to be made in any degree to contradict the same. The question is whether the Circuit Court has proceeded according to law in its action since the mandate, and in execution thereof.

It is submitted that it has not.

1. By reference to the mortgage of the Eastern Division, in the suit to foreclose which the mandate of the Supreme Court above referred to was issued, it appears that it was stipulated "that in case default for the space of sixty days shall be made in the payment of any of said interest warrants or coupons as they respectively fall due," then the trustees are authorized to take possession of the mortgaged premises and sell the same.—(Transcript to Nos. 182 and 212, December T. 1866–7, p. 209.)

But the petition in this case was filed September 10, 1866, to foreclose and sell the mortgaged premises for the interest due September 1, 1866.

It is submitted that the mandate of the Supreme Court is to be construed subject to the terms of the mortgage above recited, and that the Supreme Court did not intend to change the contract between the parties by accelerating the time fixed for a remedy for default in payment of the interest.

It would seem to be very clear that the mortgagees could not apply for a legal remedy for non-payment of the interest, until the time fixed by the mortgage itself, after default, for the entry by the mortgagees.

The Circuit Court, then, in granting the prayer of the petition filed September 10, 1866, necessarily disregarded the provision made by the parties in the mortgage, that no entry and sale of the mortgaged premises should be made until after sixty days' default.

In this respect, then, it is submitted the Circuit Court erred in granting the order appealed from.

The same remarks apply to the petition filed March 5, 1867.

2. It is submitted that the proceedings should not have been by petition, but by supplemental bill. The construction of the terms of the mortgage could be much more satisfactorily determined by bill than by petition.

A supplemental bill may be filed after a decree for the purpose of enabling the court to give directions, which

were not prayed by the original bill, but which the result of the proceedings under the decree shall have rendered proper.

3 Daniels' Chancery Practice, ed. 1868, p. 1,660, 1,662, 1,689.

3. We conclude, therefore, that the sales in these two cases were premature, irregular, without lawful authority, and therefore null and void as against the appellants.

C. CUSHING,
for the Appellants.